2000

Bruce Hartman v. Lawrence A. Young, Alma S. Young, First Security Bank of Utah, Zions First National Bank : Brief of Appellant

Utah Supreme Court

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David Sam; Clark Burt; M. John Ashton; Attorneys for Respondents.

UTAH SUPREME COURT

BRIEF

OF THE STATE OF UTAH

BRUCE HARTMAN,

Plaintiff Appellant

-vs-

LAWRENCE A. YOUNG,
ALMA S. YOUNG,
FIRST SECURITY BANK OF UTAH,
ZIONS FIRST NATIONAL BANK,

Defendant Respondents

CASE NO. 14362

APPELLANT'S PETITION FOR REHEARING

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BRIEF OF APPELLANT

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APPEAL FROM A DECLARATORY JUDGMENT OF THE DISTRICT COURT FOR UINTAH COUNTY, HON. GEORGE E. BALLIF, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff Appellant	:	CASE NO. 14362
vs.	:	BRIEF OF APPELLANT ON PETITION FOR REHEARING
LAWRENCE A. YOUNG, ALMA S. YOUNG, FIRST SECURITY BANK OF UTAH, ZIONS FIRST NATIONAL BANK,	:	
Defendant Respondents	:	

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NATURE OF THE PETITION

The above court filed its decision on June 4, 1976. Pursuant to rule 76(e) and within the time allowed, formal petition for rehearing has been filed with this court. The points relied upon there are the same as appearing in this brief. The appellant prays this court to entertain its petition for rehearing, and to reverse the trial court with a new opinion that reflects the case law apposite.

POINTS OF ERROR

I. THE COURT ERRED IN PLACING THE BURDEN OF PROOF OR THE BURDEN OF GOING FORWARD WITH THE EVIDENCE ON APPELLANT.

The bottom three lines of the first page of the decision state:

> "It seems that the appellant did not need an interpretation of a contract. What he actually wanted the court to do was to determine <u>which</u> of the copies of the contract correctly reflected the true agreement of the parties."

Said language incorrectly characterizes the pleadings and the record. At no time did appellant ask a court to determine "which" contract reflected the agreement. It pleaded the escrow instrument. Paragraph III on page 3

of the instrument made the escrow instrument the sole source of authority; all documents not escrowed are thus immaterial. Respondents admitted said instrument of execution, verification and escrowing. It then pleaded an affirmative defense of alteration, not stating the fraud to be before or after execution.

In approaching the question, reference had better be made to Exhibit 10 which was an affirmative act of the Youngs, declaring a default on a contract on which Hartman had already paid near $80,000.00. Also the court would want to consider who, in the situation at bar, was the "prime mover". The action of plaintiff Hartman was "defensive", if attention is given to the prime authority cited at the bottom of page 276 of vol. 9, Utah Code Anno. 1953 under a text of "Burden of proof in action under declaratory judgment acts, 109 ALR 1099."

The court says above "the appellant did not need an interpretation of a contract." What did appellant need? In truth the opinion is wrong in saying Hartman wanted the court to determine which of the copies of the contract correctly reflected the true agreement of the parties. The complaint refers but to the escrow copy, asking the court to "instruct all parties in the premises."

It was the Youngs who introduced the concept of another copy of the contract, this as an affirmative defense. The consequence of this pleading was never understood nor conjured with by the trial court nor the appeal court. A proper understanding thereof would produce a different result in the case. A failure to grasp the import of such affirmative defense altered the burden of proof.

This court has incorrectly stated the law in writing:

> "If he (Hartman) relies upon the declaratory judgment statute he certainly has the burden of convincing the trial court that his claim to relief is as he claimed it to be."

In the first place, Hartman alleged the escrow copy. The Youngs admitted they executed same and that it was the escrow copy. Then they became the true actors in asserting the wrongful alteration of the escrow document, just as they had been the prime movers in sending the default notice.

In the second place, the honorable court is wrong and outside the case law in placing the burden of proof on plaintiff Hartman. The decision herein is bottomed on the finding above quoted which puts the burden on appellant Hartman. As written, the distinction between prime burden of proof, and going forward with the evidence, after a prima facie case has been made, is unimportant. We are well aware of the difference. The court's writing may be ambiguous, but it's import is clear here, and is not musunderstood by appellant, nor will it be to the editors who print and comment. The indexes in the law books will cite the instant decision for the proposition that the Utah high court places the burden of proof on the person bringing a declaratory judgment action. The court cites no case law. There is an abundance of case law to the contrary. Had the court adverted to the said case law, the decision would have noted the vast majority of courts in the nation take a different view, and the decision would articulate the determination of this court to disagree.

We thank the court for its kind words in the final paragraph of our unfortunate decision:

"Apparently he (Hartman) made a prima facie showing sufficient in accordance with the statute to admit the document ..."

The court decision fails to note as a concomitant to the above finding that the trial court denied the Young's motion to dismiss or for non-suit at the conclusion of plaintiff's case. (Tr 122) By this court's allowing that plaintiff met the burden of the statute quoted (78-25-17 UCA) the case law of the highest authority places the burden of going forward with the evidence on the "prime mover", the actor, the party pleading and undertaking to establish an affirmative defense. This means the respondents had the burden, once the prima facie case was made by appellant.

The prime authority leading to an understanding of the case law for measuring the case at bar is that cited at said volume 9 at page 276 at the bottom, of the Utah statute. The annotation of 109 ALR 1099 follows the leading case of TRAVELERS' INSURANCE v GREENOUGH, 190 A. 129, 109 ALR 1096, 1937. If this court desires to disagree with said case, may it say so. The thrust of Greenough is that the mere bringing of the declaratory judgment action does not determine burden of proof. It discusses "preliminary issues," which should be disposed of ahead of a principal action, stating the declaratory judgment procedure to be admirable. It talks about a plaintiff that in truth has been put on the "defensive" in a demand by the insured to defend a negligence suit. If the driver of the insured car had been a trespasser or someone for whom consent had not been given, the insurred owed no duty to defend. The New Hampshire court wrote that to place the burden of proof on the "defensive" plaintiff who filed the declarative petition for the "preliminary" determination of an ambiguous situation, was reversible error.

The sending of Exhibit 10 by the Youngs to plaintiff Hartman put the plaintiff "on the defensive" just as the demand to defend the insurance-negligence case did the insurrer.

Now please advert to the three final lines on the first page of the instant decision of this court: their ring is hollow, shallow. In no way do they put the compass on plaintiff's dilemma, after receiving Exhibit 10. Plaintiff had three alternatives: 1) pay the Youngs the $4171.00 so demanded; 2) do nothing, and let the 60-day notice run; then run the risks stated in the default clauses of the contract which among other things embraced a retaking of the farm without legal action; 3) follow the procedure outlined by the New Hampshire court as an act of good faith, preliminarily taking the heat off by depositing the fund in court.

Paragraph III on page 3 of the contract told the plaintiff to check the escrow document at the bank. Thereby the other two copies, exhibits 2 and 3 are irrelevant, immaterial and incompetent. Now plaintiff and his counsel go to the bank. The articulation in the opinion that "The escrow agent allowed the appellant to take his copy of the contract" is unworthy. (There is not the slightest hint in the evidence that the document was touched at any time after execution and acknowledgment except by authorized bank personnel !)

In terms of the disposition of this case at the trial and appeal level, the plaintiff would have done better to take the risks of number two above. The consideration of doing nothing, but waiting for the Youngs to actually effect the default procedures, will point up the error in the decision: Had Hartman done nothing, the Youngs would have acted either by moving back onto the farm (with guns), or entering suit for eviction, unlawful detainer or the like. Had such been done, then who would this court find

had the burden of proof? On a correct answer to this question hangs the proper disposal of the case at bar. There can be no question; it would have fallen on the Youngs. This question of law is clearly discussed in TRAVELERS INSURANCE v GREENOUGH, 190 A 129, 109 ALR 196 (cited at pages 22, 25, 27 of our main brief) where the appeal court stated:

> "Whatever the form of the proceeding and notwithstanding its nominal position as a plaintiff, the real situation is that it is defending against a claim of its liability. The relief it seeks is primarily to have the claim adjudicated. Its position that the claim is without merit is necessary, in order to show the claim is a controverted one. By instituting the litigation it compels the claimant to take action in assertion of his claim. He (the insured claimant) is required to establish it to entitle it to valadity...the claim is defeated if it is not proved, and it is for the claimant to furnish the proof." (emphasis added)

The New Hampshire court stated that to hold a contrary view "would place the plaintiff in a position of undue disadvantage." Appellant in the case at bar has been placed by this court, as well as the trial court, in the same disadvantaged position. The naked statement in the opinion of this court that the burden was on appellant is wrong, contrary to the case law of the country. Said Travelers v. Greenough has become the law of the land!

The next strong burden of proof case under declaratory judgment procedure, in discussing the issue, is PREFERRED ACCIDENT INS. v. GRASSO, 186 F2d 987; 23 ALR 2d 1234, cited and discussed at page 24 of our original brief. The 2nd CCA case is there fully discussed. Sufficient to quote here:

> "Does the fact that this is the insurer's action for a declaratory judgment change the principle? It would seem rather anamalous that so important a matter should depend on the chance of who first sues and the outstanding authority in the field argues against such a result. Borchard, Declaratory Judgments..."

where that familiar authority argues "that the burden of proof in declaratory judgment actions rests, in the vast majority of cases, on the moving party." He assigns this burden to "the insured or injured person." The 2nd CCA held the burden was not on the plaintiff insurance carrier, but on the insured and the injured party. Two important cases are cited as authority for the decision: Travelers Ins. v Greenough, supra, and RELIANCE LIFE v BURGESS, 8 Cir 112 F2d 234, certiorari denied 311 US 699 etc. (cited at pages 25, and two other places in our original brief. Borchard has been quoted at length by this court in GRAY v DEFA 153 P2d 544 and elsewhere.

Following said Grasso case is a 34 page annotation under the heading: "BURDEN OF PROOF IN ACTIONS UNDER GENERAL DECLARATORY JUDGMENT ACTS." There is no evidence in the text of the decision at bar that the court adverted to said annotation, nor that appearing after the above Greenough citation. It is doubtful this court has plumbed the law stated in the second paragraph on page two of its decision. The cases are so well analyzed in the said annotation, we will not elaborate. Many cases cited therein are cited in our brief. At page 1252 of the annotation it is stated:

> "There is no one principle or set of principles that governs the incidence of burden of proof in all cases. It is merely a question of policy and fairness based on experience in the different situations."

The Utah court has adopted a "policy" as stated at line 8 of page 2 of its decision which is not elaborated in terms familiar to its own decisions and those of other states. The decision lacks fairness. It is a denial of constitutional due process of law. There is no Utah authority stating the rule announced in the case at bar. The court should be impressed with the vast cerebration employed on the subject around the nation and not

reflected in its decision. Appellant tried to find the law of the case. Unfortunately it cited 46 cases, all in point, only to find the court cited not one. It will be found appellant disclosed pertinent case law to the many problems incident to the case at bar. We desire not to repeat.

It is disheartening to cite cases when the writer has a conviction they are not read, adverted to. Our neighboring court wrote in FIRST NATL. BANK v FORD, _____Wyo ____, 216 P 691, 31 ALR 1441

> "The burden of proof is upon the party asserting the affirmative of an issue."

This was an alteration case where the bank offered a note for $450 for collection which the defendant admitted signing, but for only $150, the instrument being raised by an unlawful alteration. While the change was not obvious on its face, the law is ably discussed. Appellant is lost when the courts ignore its attempt to find the case law. The above case is one of the better discussions on the subject of alteration, burden of proof.

The court said the factual issues were in conflict. Burden of proof is one of the sole means of the court in dealing with such conflicts, so held in PREFERRED ACCIDENT INS. CO. v GRASSO, supra in the following:

> "As the first district judge found the evidence conflicting and unsatisfactory and finally settled it through the medium of the burden of proof ..."

A lawful assessment of such burden would and will produce a different result in this case, and bring justice and rationality out into the light.

Appellant has never been so fortunate as to have the court say NORTHCREST v WALKER BANK 122 U 268, 248 P2d 692 was important to the disposition of this case. The trial and appeal courts have ignored its citation. It

is believed Exhibit 1, the escrow document as it lay in the bank, was of equal stature to a recorded deed or contract. Northcrest and its peers stand for a sound doctrine of he who assails a regularly verified document must do so with clear and convincing evidence. The wrong here is that the assailant had no evidence; and by the application of the false imposition of burden of proof was able to prevail only on the basis of inference, inuendo, and the seemy theory that as the document in escrow was taken from the vault two times by the escrow officer, there might have been a chance for the forgery by appellant. Northcrest is good law. It should have been applied to the case at bar. There is still time to employ Northcrest. When its splendid doctrine is brought to bear the unfair inferences will take their low place, exposed for what they are.

The instant decision states: "If he relies upon the declaratory judgment statute, he certainly has the burden of convincing the trial court that his claim to relief is as he claims it to be." A careful study of the complaint and answer will show that everything appellant claimed was admitted by respondents. Plaintiff "claimed" Exhibit 1 was duly executed, verified and filed in the escrow. Plaintiff "claimed" nothing for any other document, for under paragraph III on page 3 all other documents outside the escrow are immaterial. How the court could be so sure of its burden-of-proof conclusion as to use the underlined "certainly" is ambiguous to say the least. It is not the law. The case will be overruled by some subsequent court.

In the final paragraph of the decison the court concludes the trier, by admitting the escrow document is not required to "accept the document as genuine." By overruling defendants' motion for nonsuit, and by this

court's finding a prima facie case was made by plaintiff, the escrow document must stand; let he who assails now prove the fraud, the forgery it claimed. In the face of the disputed evidence, and in terms of the great weight of authority that the burden is on the party asserting the wrong or unlawful alteration or any fundamental affirmative defense, this court should hold the Youngs must prove their claim with clear and convincing evidence. Plaintiff was put in an impossible position at the outset. This court has compounded a grave injustice, and this without evidence, and against the great weight of law.

The trial court erred initially in putting the burden on plaintiff. Thus plaintiff had to go forward. Under 78-25-17 and good case law, it was plaintiff's duty to "explain" and "account for" the alteration complained of. Of necessity exhibits 2 and 3 came to the court; but when the court denied defendants' motion to dismiss, at the conclusion of plaintiff's prima facie case, the dignity of exhibits 2 and 3 lowered, according to the text of page III, paragraph 3.

The escrow document being sufficiently explained, took to the high ground of a verified, recorded conveyance. The California court in ROADSIDE REST v LANKERSHIM 173 P2d 554 is not easy to sweep under the rug. It will enlighten if light is desired, along with a dozen other strong cases cited in our original brief. This court should rehear and alter its decision.

II. THE COURT ERRED IN CREATING ITS OWN CONTRACT, AND DISREGARDING THE CONTRACT AGREED TO BY THE PARTIES, AND ESCROWED.

The opinion as written violates this court's ruling in such cases as EPHRAIM THEATRE v HAWK, 321 P2d 221. The effect of the lower court's decision, affirmed here, makes a new and different contract than the parties

agreed to at the bank. Why is there no reference to paragraph III of page 3 wherein the bank is to hold "all documents appurtenant to or used in connection with this agreement..."? The decision turns on and validates Exhibit 3, not Exhibit 1. The decision says the three exhibits are identical except for the contested change at line 21 at page 2. This is not true. Let this court state which exhibit is controlling. The water stock certificate numbers are complete on Exhibit 1. They are totally absent in Exhibit 3. The land without the water is useless! On page 3 blanks were left open relating to buyer paying assessments after a date to be filled in. Exhibit 1 was filled in 14 lines from the top. Exhibit 3 is as blank as the day it was typed.

The court has violated its own rules, as quoted at page 48 of the original brief in EPHRAIM THEATRE v HAWK, 321 P2d 221. Since when does this court modify firm agreements to suit their own whim? Has this court abandoned its time-honored holding in MOODY v SMITH 9 Utah 2d 139, 340 P2d 83: "Plaintiff cannot seek to alter a portion of a valid written contract ... It would defeat the very purpose of formal contracts to permit a party to invoke the use of words ... inconsistent with its terms to prove that the parties did not mean what they said." Exhibit 1 has been abandoned; Exhibit 3 is raised to appurtenance, and it is an incomplete instrument. Such result is a "reformation", never pleaded nor contended for at the trial. This court has held reformation must be pleaded! It was not pleaded. It became an afterthought by the court, along with "mistake" also not pleaded nor proven.

Exhibit 1 was the prime document the parties agreed would control. There was a deliberation applied to it, absent in the other two which were collateral, not fully conformed, kept but for reference. Yet the unconformed Exhibit 3 has risen to the prime expression of the parties. Specific enforcement of Exhibit 3 would produce poor results. Yet has not this court, as well as the court below substituted the incomplete Exhibit 3 for the escrow instrument? If this is what the court intends, let is so state so the editors of American Law Reports, American Jurisprudence and the rest may know where this court stands.

III. THE COURT ERRED IN FINDING THERE ARE NO INITIALS BY THE ALTERATION.

The decision states "There are no initials by the changed numeral..." The case could make some worthwhile law, helpful to jurisprudence if this court would allow that there are initials within from three to five lines of the alteration in question. Let this court illuminate this true issue. As it is, the decision is a fog. We have searched the cases and find nothing worth citing on such placement of initials juxtaposed to an alteration.

Admittedly it is a "tough", hard decision to find the parties intended the initials at lines 24 and 25 were intended to reach to line 21. Burden of proof, as assigned to the asserting the affirmative that the change was in truth a forgery, and the initials were not intended to reach such change, is a convenient way courts solve such problems. A court of equity in an equity case has the power to employ conscience. Conscience came off second best to inference, at both levels.

IV. THE COURT ERRED IN FINDING "THE ESCROW AGENT ALLOWED APPELLENT TO TAKE HIS COPY OF THE CONTRACT".

The decision states "The escrow agent allowed the appellant to take his copy of the contract on more than one occasion ... he had access to the document, and the opportunity to change it." Appellant resents these words. They represent prejudice and are capricious for there is no evidence the appellant or his counsel even touched Exhibit 1. When this united court will allow such language and the inferences incident thereto, there is no chance to pursuade on other critical issues. The whole case of respondents was built on such thin inferences when under doctrines continuously announced by this court, the accusers should have produced evidence, clear and convincing. In NORTHCREST v WALKER BANK cited at page 45 of our brief it is repeated:

> It is true that such acknowledgment and recordation give rise to a presumption of the genuiness and the due execution and delivery of the deed and is prima facie evidence thereof. This presumption should not be regarded lightly but should be given great weight. The authorites generally hold that the effect of such certificate of acknowledgment will not be overthrown upon a mere preponderence of the evidence, but it must be clear and convincing.

If this court does not care to apply such law to the facts of a verified, escrowed contract of large money involvement, let it so state, please.

CONCLUSION

This appeal court compounded the errors of the trial court. In terms of rule 76 (e) petition is made for a rehearing for the reasons stated herein. Reference is made to appellant's original brief, and particularly to points II, III and IV and to the cases cited. Point one relates to the evidence. It being conflicting the problems may be solved by a proper application to burden of proof being assigned to the respondents for they were the prime movers from the default letter to the effort to establish their affirmative defense. In this they failed. The trial court should still be reversed. The money on deposit awarded to appellant.

Respectfully,

Warwick C. Lamoreaux, attorney for appellant.

This is to certify that on the 18 day of June 1976, the undersigned mailed two copies of the within APPELLANT'S PETITION FOR REHEARING, together with two copies of appellant brief in connection therewith; to David Sam and Leroy Park, attorneys for respondents, postage prepaid and addressed to them at Suit 100, Professional Plaza, Duchesne, Utah 84021.

W. C. Lamoreaux

Each of the undersigned has received a copy of the within petition for rehearing, and also a copy of the appellant's brief in connection therewith this _____ day of June 1976.

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